U.S. Department of Homeland Security
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U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date: AUG 10 2007

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IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied[1] the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner provides software developing and consulting services. It seeks to employ the beneficiary permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. As required by statute, the petition was accompanied by certification from the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the multiple beneficiaries the proffered wages and questioned whether the petitioner was in active corporate status.

On appeal, counsel submitted a brief and additional evidence. Subsequently, the petitioner submitted a letter to Citizenship and Immigration Services (CIS) including a list of 165 Form I-140 petitions filed by the petitioner over the past 7 years. The petitioner advised that, as of June 14, 2007, only 18 beneficiaries continued to work for the petitioner and, thus, that it only needed to demonstrate the ability to pay those 18. The petitioner requests that 147 of the petitions "be withdrawn." The instant petition is included on the list, followed by "withdraw this I-140."

The regulation at 8 C.F.R. § 103.2(b)(6) provides that a petitioner "may withdraw an application or petition at any time *until a decision is issued* by the Service or, in the case of an approved petition, until the person is admitted or granted adjustment or change of status, based on the petition." (Emphasis added.) A withdrawal may not be retracted. *Id.* The regulation at 8 C.F.R. § 103.3(a)(2)(ix) provides that an affected party may withdraw an appeal before a decision is made. The petitioner requested withdrawal of the Form I-140 petition, which had already been denied and appealed, and not the pending appeal. Thus, on July 12, 2007, this office contacted counsel by facsimile and inquired as to whether the petitioner wished to withdraw the appeal. Counsel responded, advising that the petitioner wished to pursue the appeal.

We acknowledge that our facsimile offered the petitioner the opportunity to continue with the appeal. That said, as noted above, a withdrawal cannot be retracted. The regulation at 8 C.F.R. § 205.1(a)(3)(iii)(C) provides that a written withdrawal of a petition is basis for an automatic revocation of an approved petition. Thus, even if we were to make a favorable finding in this matter, the petitioner's withdrawal of the Form I-140 petition, which cannot be retracted, would be grounds for an automatic revocation.

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[1] Although the final sentence of the director's decision provides that the "petition is hereby revoked," we note that the petition was never approved. As there was never an approval subject to revocation, the director's decision must be considered a denial. It would be absurd to suggest that CIS or any agency must treat acknowledged errors as binding precedent. *Sussex Engg. Ltd. v. Montgomery*, 825 F.2d 1084, 1090 (6th Cir. 1987), *cert. denied*, 485 U.S. 1008 (1988).

Finally, the statements in the withdrawal notice are relevant to the issue before us, the petitioner's ability to pay the proffered wage. Specifically, the petitioner advised that it was only attempting to demonstrate its ability to pay the proffered wage for 18 beneficiaries, none of which are the beneficiary in this matter.

The regulation at 8 C.F.R. § 204.5(g)(2) states, in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, the day the ETA Form 9089 was accepted for processing by any office within the employment system of the Department of Labor. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted for processing on August 31, 2006. The proffered wage as stated on the ETA Form 9089 is $35.49 per hour, which amounts to $73,819.20 annually. On Part K of the ETA Form 9089, signed by the beneficiary, the beneficiary claimed to have worked for the petitioner as of January 11, 2005.

On the petition, the petitioner claimed to have an establishment date in 1993, a gross annual income of $19,020,791, no available net income and 250 employees. In support of the petition, the petitioner submitted its Internal Revenue Service (IRS) Form 1120S U.S. Income Tax Returns for an S Corporation for 2005.

On December 29, 2006, the director issued a request for additional evidence. The director noted that the petitioner had filed multiple petitions with Citizenship and Immigration Services (CIS) and requested a list of all petitions the petitioner had filed with CIS and evidence of the petitioner's ability to pay the proffered wage for all of the beneficiaries. The director advised the petitioner to withdraw any petitions for beneficiaries for whom the petitioner was unable to pay the proffered wage. The director also asserted that the petitioner had not claimed a consistent number of employees on the various petitions and requested California Employment Development Department (EDD) Form DE-6 Quarterly Wage Reports for the last two quarters and the quarterly returns for any other state in which such returns were filed if the petitioner was not located in California. Finally, the director asserted that "public records" indicated that the petitioner's business license in California was suspended. The director requested evidence that the petitioner possessed an active business license.

In response, the petitioner submitted contracts for the beneficiary's services and the petitioner's Form DE-6 quarterly returns for the third and fourth quarters of 2006. The petitioner did not submit quarterly returns filed in any other state. The California quarterly returns show 25 employees in the

third quarter and 24 employees in the fourth quarter. The beneficiary is not listed as an employee on either quarterly return. In addition, the petitioner submitted copies of the Form W-2, Wage and Tax Statement, the petitioner issued to the beneficiary in 2005, showing wages of $59,698.34. Further, the petitioner submitted two purported pay statements from February 2007 purporting to document bi-weekly wages of $2,500 from the petitioner to the beneficiary. Those wages annualize to $65,000. Finally, while counsel indicated that the petitioner was submitting its current business license, that document was not included.

The director noted the submission of a list of multiple petitions for 166 aliens and determined that the petitioner had not been responsive to the request for evidence that the petitioner can pay the proffered wage of all of the beneficiaries represented by the multiple petitions. The director further noted that the petitioner was not simply contracting the beneficiary's services to clients desirous of the beneficiary's services but through a consulting contractor (FCS Software Solutions) to a third party (GE Transportation). Based on this information, the director questioned whether the petitioner was offering the beneficiary a full-time position. The director also noted the inconsistency between the petitioner's claim to have 250 employees and the list of far fewer employees on the quarterly returns and the absence of the beneficiary's name on the quarterly returns. In addition, the director noted the petitioner's failure to submit its current business license. Finally, the director analyzed the payments to the beneficiary and the petitioner's net income and concluded that the petitioner had not demonstrated its ability to pay the proffered wage given the numerous other Form I-140 petitions filed by the petitioner.

On appeal, counsel asserts that the petitioner's business licenses are valid, that the petitioner is offering the beneficiary a permanent job regardless of the duration of the individual contracts and that the petitioner's net income covers the difference between the proffered wage and the wages paid to the beneficiary. The petitioner submits the beneficiary's purported pay statements for March 2007, the petitioner's 2006 tax return and evidence that the petitioner is an active corporation in California and in good standing in New Jersey. Counsel does not address the beneficiary's absence from the list of the petitioner's employees on the quarterly returns or the fact that the petitioner must demonstrate its ability to pay all of the beneficiaries for whom it has petitioned.

Where the petitioner has submitted the requisite initial documentation required in the regulation at 8 C.F.R. § 204.5(g)(2), Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during the relevant period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. In the instant case, the petitioner did not establish that it employed and paid the beneficiary the full proffered wage in 2006. Rather, the difference between the proffered wage and the wages paid is $14,120.86.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, CIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the

proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983). Showing that the petitioner's gross receipts exceeded the proffered wage is insufficient. Similarly, showing that the petitioner paid wages in excess of the proffered wage is insufficient. In *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. at 1084, the court held that the Immigration and Naturalization Service, now CIS, had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. The court specifically rejected the argument that the Service should have considered income before expenses were paid rather than net income.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's net current assets, the difference between the petitioner's current assets and current liabilities.[2]

As noted by counsel, the petitioner's purported net income in 2006, $147,934, would more than cover the difference between the proffered wage and the wages purportedly paid to the beneficiary in 2006. That would normally end our inquiry. The petitioner, however, has submitted inconsistent evidence in this proceeding that seriously undermines the credibility of the documentation submitted.

Specifically, while the director did not add the "public records" indicating that the petitioner's license had been suspended and the petitioner has demonstrated that its status is active in California, the petitioner seriously misrepresented its number of employees on the Form I-140 petition. While the petitioner claimed to employ 250 current employees, its quarterly returns reflect nor more than 25. Moreover, as stated by the director, the quarterly reports for the second half of 2006 do not list the beneficiary as an employee. The petitioner makes no attempt to address this issue on appeal. Moreover, we cannot ignore that the petitioner has withdrawn 147 petitions after being advised that it had not demonstrated an ability to pay all of the beneficiaries of those petitions, including a belated attempt to withdraw the petition before us. The petitioner offers no explanation for attempting to withdraw the petition due to the fact that the beneficiary no longer works there and subsequently requesting to pursue the appeal. Despite the director's specific request for the petitioner to demonstrate that it has the ability to pay the proffered wage for all of the beneficiaries of pending petitions (even after all the withdrawals, 18 beneficiaries remain not including the beneficiary in this matter), counsel only addresses the petitioner's ability to pay this beneficiary on appeal.

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[2] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence. Any attempt to explain or reconcile such inconsistencies will not suffice unless the petitioner submits competent objective evidence pointing to where the truth lies. *Matter of Ho*, 19 I&N Dec. 582, 591-92 (BIA 1988). Moreover, doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Id.* at 591.

The petitioner failed to submit credible evidence sufficient to demonstrate that it had the ability to pay the proffered wage of the beneficiary in addition to the other 18 beneficiaries of the petitions the petitioner did not withdraw. Therefore, the petitioner has not established that it had the continuing ability to pay the proffered wage beginning on the priority date.

Finally, the AAO notes that the beneficiary is currently in the United States pursuant to a nonimmigrant H1B visa filed in his behalf by the petitioner, receipt number WAC-07-079-51052. The Director, California Service Center, issued a request for additional evidence on March 26, 2007, received a response to that notice on June 13, 2007 and approved the nonimmigrant petition on June 19, 2007. Given that the petitioner also advised CIS that as of June 14, 2007, the beneficiary was not employed by the petitioner, the director is instructed to review the approval of the nonimmigrant petition for possible revocation, pursuant to 8 C.F.R. § 214.2(h)(11).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.